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Board orders review of boy's case

Attorney finds that a brain scan mentioned in officer's first ruling was never taken

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Citing "inaccurate evidence" that had been used by the state Attorney General's office to argue against lifelong medical care for a severely brain-damaged Roanoke boy, the Workers' Compensation Commission has ordered a new hearing in the case.

The decision Wednesday follows months of legal arguments in the case of 4-year-old Elijah Johnson and comes as procedural and medical issues related to operation of the state's Birth-related Neurological Injury Compensation Program are coming under increasing attack by lawyers representing severely disabled children.

The legal barrage to push acceptance of children qualifying for expensive nursing care and medical costs is confronting long-term program deficits that have reached nearly $100 million.

Required to operate with sufficient cash reserves to guarantee qualified children lifetime care, the program has sharply reduced benefits but done nothing to push for substantial fee increases paid by doctors, hospitals and insurers.

In arguing for a new hearing in the Johnson case, Fairfax lawyer Ann Jones uncovered discrepancies among hundreds of pages of medical reports on Elijah's condition. The discrepancies falsely implied that brain scans showed no damage to the infant at birth.

Those scans were never actually taken, Jones discovered.

Deputy Attorney General Frank Ferguson said yesterday that the mistakes were inadvertent and stemmed from a medical expert's belief that the scans had been performed and showed no in-REVIEW jury. The expert, pediatrician W. Thomas Bass, said that the misinterpretation would not affect his overall opinion in the case recommending denial. Assistant Attorney General Carla Hall argued in briefs that "such a mistake was merely harmless error."

But the full commission concluded that the incorrect information, which was cited repeatedly in hearing officer John Costa's denial, deprived Johnson of a fair hearing. The commission ordered another hearing and allowed Jones to bring in additional medical experts and evidence.

Jones has charged that medical experts hired by the program and a medical panel used to assess birth-injured children have ignored previous findings in birth-injury cases showing that Johnson qualifies. She also has alleged that Costa improperly employed a set of controversial criteria to decide the case.

Jones is also challenging those same criteria in the case of a woman whose daughter's entry into

the program had been opposed for months by the program and the attorney general's office, which serves as the program's legal counsel. At a hearing last week, the program unexpectedly dropped active opposition to Shayla Pham's entry but stopped short of advocating the child's entry into the program.

A decision in that case is expected to take several weeks.

In another opinion released this week, the commission reversed a decision last year that denied benefits to a Northern Virginia child with severe brain damage and cerebral palsy. The denial came despite testimony from a leading physician who helped develop the birth-injury program and who argued that the child clearly meets program guidelines.

"Quite honestly, then as now, Jenna is the type of baby I believe that the [birth-injury program] was designed for," Dr. J. Peter Van Dorsten testified at a hearing in the case.

The commission said that experts who testified on behalf of the child had carried Jenna Bakke's burden of proof and that experts for the program had not presented evidence of specific alternative causes of her brain damage.

Now 5 years old, Jenna weighed less than 3 pounds at birth and since her earliest days has been totally disabled, mentally and physically. In addition to severe mental and physical injuries, a child can gain entry into the program only if it can be shown that oxygen loss during labor and delivery lead to brain damage.

"The decision can lift a tremendous burden on the family," said lawyer Leslie Zork, who filed the case, which began as a malpractice suit, in April 2003.

"The Bakke and Johnson opinions are a rejection of junk science and unfair treatment of these infants, and hopefully marks the end of open season on profoundly injured infants and their families," Jones said yesterday.

George Deebo, executive director of the birth-injury program, said no decision has been reached about whether to appeal the Bakke case, which also carries an important finding about use of the controversial criteria. He and Ferguson denied efforts to limit access to care, arguing that the program merely is working to be sure that qualified infants receive the care.

In the Bakke case, the commission found that the criteria, which have been adopted by medical panels that help assess children for care, cannot be used independently to judge a case. They can only be applied by experts to gauge the likelihood of oxygen-related brain damage.

The birth-injury program, which is responsible now for about 90 children, was created in 1988 to maintain the availability of medical malpractice insurance for obstetricians and to provide care to a specific class of injured babies. Doctors and hospitals who pay to participate in the no-fault program cannot be sued if a brain-damaged child qualifies for program care.

Ironically, the program's gloomy financial condition threatens to force a boost in fees that could offset financial gains doctors are now seeking through reforms in malpractice laws.

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